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I. INTRODUCTION

Tokyo has now joined London and New York as one of the three major securities markets in the world. With world capital movements challenging even the importance of international trade in goods in the 1990s, uniform laws and business practices become a pressing goal for the international financial community.[1] Yet, the cultural, social, economic, and political contexts in which the three leading exchanges operate are indeed quite different and often controversial.[2] Understanding

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1. The following are among the most recent articles on this topic: *Symposium: International Securities Regulation: Recent Developments in the United States, United Kingdom, and European Community*, 16 BROOKLYN J. INT'L L. 1 (1990); *Symposium: Internationalization of the Securities Markets*, 9 MICH. Y.B. INT'L LEGAL STUD. 1 (1988); *Symposium: The Internationalization of the Securities Markets*, 11 MD. J. INT'L L. & TRADE 157 (1987); *Symposium: Internationalization of the Securities Markets*, 4 B.U. INT'L L.J. 1 (1986); Reece, *Buyer Beware: The United States No Longer Wants Foreign Capital to Fund Corporate Acquisitions*, 18 DEN. J. INT'L L. & POL'Y 279 (1990).

2. The political and economic differences between the United States and Japan are being more sharply drawn by new critics of Japan's policies for trade and investments and the Japanese climate for foreign business in Tokyo. *See Beyond Japan-Bashing: The Gang-of-Four defends the Revisionist Line*, U.S. NEWS & WORLD REP., May 7, 1990, at 54 (where they are called "revisionist" (or the "Gang-of-Four")); C. PRESTOWITZ, TRADING PLACES: HOW WE ALLOWED JAPAN TO TAKE THE LEAD (1988); Fallows, *Containing Japan*, ATLANTIC MONTHLY, May 1989, at 43; Johnson, *The Problem of Japan in an Era of Structural Change*, 9 INT'L HOUSE JAPAN BULL. 1 (1989); K. VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER (1989). P. CHOATE, AGENTS OF INFLUENCE (1990) (concerning Japanese lobbying in Washington D.C.) should now probably be added to this list. *See also* Fingleton, *Innocents Abroad: Eastern Economics*, ATLANTIC MONTHLY, Oct. 1990, at 72. Whatever one's position may be on such issues, clearly the differences are real and require attention. The broadening of the debate is not simply "Japan bashing" as many Japanese would like to have it labelled in order to stifle discussion of a full range of the relationship. Nor is it probably helpful to call them the "Gang of Four." In fact, the American scene deserves much of the same candor to highlight our policy failures. *See* D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAWS

these key differences is crucial to the effective uniformity of practices. It is not likely that true uniformity which can be relied upon by investors is possible anytime soon. Accommodating national contextual variables in a uniform global, enforceable,[3] trading system will be a major challenge for each of the nations involved as trading around the world and around the clock becomes more and more commonplace.

This Article will identify some distinctive features of American and Japanese business cultures and securities markets molded by differences in their national contexts. Such a subject is so broad that the selection of and focus on the differences must be sharp, and the treatment of them personal, sometimes impressionistic, in order to cover all the issues.

The United States and Japan both possess, in an overall sense, similar constitutional governments, democratic politics, free enterprise systems, market economies, justiciable private law systems, and literate hardworking populations, all of which facilitate vigorous private sectors. The two nations have much else in common which draws them together to work responsibly for a better world.

However, perhaps a central contextual difference in our two societies deserves emphasis up front. It concerns the role of law and its importance to individualism. Americans are perhaps at one pole on the spectrum. Americans take their constitution seriously, and thus often take it to court. Americans are both the most litigious and the most individualistic of people—to a fault some would say, because it is not clear that certain aspects of the American "me generation" are the model of the global future. For Americans, individualism means legalistic rights implemented by justiciable law, lawsuits, and lawyers. Indeed, for America, over-populated by lawyers, a key social figure in the system is the lawyer. At the other pole, the Japanese are comfortable with "do as you are told law," and are normally submerged in, and highly disciplined by, their social groupings, family, school, company, nation, and the like outside the justiciable law. For the Japanese it is clearly the bureaucrat, a position which, broadly conceived, includes all societal authority figures in business associations and companies, schools, families, and so on, which regularly are consulted by officialdom for a consensus of sorts.

For the Japanese, their post-World War II decentralized sociality has borne high domestic yields, but the rewards have not been delivered

AND POLICIES ch. 6 (1983); Henderson, *Access to the Japanese Market*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 131 (G. Saxonhouse & K. Yamamura eds. 1986).

3. For enforcement problems, see Thomas, *Icarus and His Waxen Wings: Congress Attempts to Address the Challenges of Insider Trading in a Globalized Securities Market*, 23 VAND. J. TRANSNAT'L L. 99 (1990).

by a legal midwife. Law, lawsuits, and lawyers have a diminished role in Japan,[4] clearly subordinate to bureaucratic administration (authority and discretion).

Such insights are as central to our problem as they are difficult to articulate in the abstract. Emphatically, these polar differences include American peculiarities as much as they do Japanese peculiarities. Awareness of these peculiarities is all the more critical precisely because it is their ethnocentric justiciable law that Americans, as past leaders in global securities regulation, are prone to rely upon to adumbrate both the New York and Tokyo markets, and to construct a global securities trading regime. Neither contracts nor law have been notably successful for Americans[5] in dealing with Japan, because for over thirty years both sides have complained about liberalization, level playing fields, targeting, dumping, industrial espionage, protectionism, and subsidization.

From this central difference flow other differences requiring understanding at the outset of our study. These differences reside in Japanese and American attitudes toward diversity, mercantilism, nationalism, and practical commitments to sustaining an international economic order, significantly attainable only if based on law. These basic cultural problems will increasingly surface and must be solved if we are to create a viable political climate for global securities markets. A justiciable legal structure for global trading cannot be finessed. Resolute understanding of the role of these central differences in law, and the time it will take to develop a viable justiciable securities law in Japan, must be retained in

4. *See* Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer Substitutes: The Market For Regulation in Japan*, 27 HARV. INT'L L.J. 499 (1986); T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN ch. 2 (1985).

5. The public understanding of the "Ron-Yasu" (Reagan-Nakasone) annual trade meetings was a typical illustration of my point about the usefulness of adumbrating law: each meeting ended with an accord to reduce the trade deficit, which the American media reports without any historical sense, and the American reader treats as a deal, a contract. The Japanese treat it as essentially an accommodating felicitation, because every knowledgeable individual understands that Nakasone, as a "mere" Prime Minister, cannot deliver, given the Japanese social and business autonomy, and its role in the political process. But, as Clyde Prestowitz correctly points out, our government has no "institutional memory." C. PRESTOWITZ, *supra* note 2, at 45. So, decade after decade we have our annual American celebration of the end of Japanese protectionism. But still, virtually every time a foreigner has a better product or a better price, he has consistently been stiff-armed at the border, smothered on entry, or had his price jacked up several times before the product reached the consumer. The SII accord is but the latest of such projects, all law and contract, as opposed to de facto power. For a careful and academic analysis of the usefulness of trade methods other than contract and justiciable law, see Peterson, *Enforcing U.S. Foreign Trade Legislation: Is There A Need for Expanded Presidential Discretion*, 24 J. WORLD TRADE 79 (1990).

the background of all later discussions of specialized doctrine, statutes, and institutions of the U.S. securities markets.

The points which will be discussed will indicate the depth of future concerns. In addressing them, one is fortified by the wisdom of the late Professor Reischaur,[6] who once observed that too often the Japanese-American dialogue has been fed on baby food too bland to nourish real understanding.

In passing, we should note that many of the issues raised below are related to the broadly gauged Structural Impediment Initiatives (SII)[7] addressed in 1990 by reports between the governments of the United States and Japan. These reports have identified some major issues on both sides, but the shortcomings of the reports lie precisely in the assumptions they might raise in American minds that the problems might be resolved without realistic implementation. After all, the Maekawa Report addressed some of the same issues (*e.g.* land use) in Japan nearly five years ago, and if anything the problems have been intensified in the interim, rather than solved.

II. DISTINCTIVE SYSTEMIC FEATURES IN CORPORATE LAW

A. Macro-Comparisons

Our study will begin with an overall comparison of the U.S. and Japanese corporate legal systems. This analysis, despite its intricacies, may be the easiest. Defining a security or an insider are technical

6. ASAHI SHIMBUN STAFF, PACIFIC RIVALS 2 (Tokyo 1972).

7. The Structural Impediments Initiative (SII) negotiations between the governments of the United States and Japan produced an agreement signed June 28, 1990. *See Key Elements of U.S.-Japan Structural Impediments Initiative Joint Report Released By U.S.T.R., June 28, 1990*, 7 Int'l Trade Rep. (BNA) 1014 (July 4, 1990). Japan agreed to take action on the following basic structural issues among others which have impeded foreign access for decades: more public investment in infrastructure; better land use; more rationalized distribution; more antimonopoly enforcement; reduced cartels and combines (keiretsu); improved the protection of technology; and lowered consumer prices on imports, which have consistently for decades been marked-up unreasonably before they get to consumers.

The United States committed itself to reduce the federal deficit; promote saving; reform product liability law; and improve education, among other obvious and basic flaws. Although the SII identifies obvious and basic problems on both sides, there is much room for skepticism about the implementation of such an agreement given the decades of foot dragging history of Japanese "liberalization," and American excessive consumerism of the "now and me generation" existent for a full twenty years with very little national leadership to point the way out. For additional strong reservations about the value of such an exercise without constant pressure for compliance and especially without leadership from the policy establishment in Washington, unlikely with the Presidency and Congress split between the parties, see *Fingleton, supra* note 2.

problems of great specialized importance to securities regulations, whether national or international. But technical definitions do not travel well across national boundaries or across linguistic and cultural barriers, and are best dealt with by specialists. Here we will discuss four general differences in the corporate legal systems of the United States and Japan. The understanding of these differences is important to all efforts to standardize across national boundaries.

Turning first to the broadest contours of both nations' corporate laws, is the fact that Japan is a civil-law country with its own juristic method and structure of corporate law, typical of a code system, as opposed to American corporate law which is couched in a common-law context. Japanese corporate law is codified as Book II of a very systematic Commercial Code[8] with the usual general provisions (*sosoku*) and special divisions (*hen*: "books") integrated with special statutes (*tokuhō*), in turn systematically interrelated to other codes in the civil-law system.[9] The Commercial Code was first enacted in 1898, mostly fashioned after German models. It was substantially amended before World War II in 1938 and again after World War II in 1951. The 1951 amendments strengthened the board of directors and also strengthened individual shareholder's rights. Under the auspices of the Allied Occupation, the 1951 amendments brought to the code a substantial overlay of American corporate law, drawn largely from Illinois state laws.[10] The amendment process has continued[11] right up to the present with amendments in 1990 which distinguish between the treatment of large and small corporations, and require higher minimal capital for stock corporations (*kabushiki kaisha*, KK), in an attempt to encourage small enterprises to use the Limited Liability Company (*yugen-kaisha*, YK). Despite the infusion of American law and the recent amendments, the corporate law, in concept and method, is essentially civil in nature.

American corporate law on the other hand, is a statutory overlay on

8. Shōhō (Commercial Code), Law No. 48 of 1899 [SHŌHŌ] (Eibun-Hōrei-Sha trans. 1983). This is a convenient translation. However, as with any translation, it will prove inadequate when the operative Japanese is subjected to pressures in solving problems of interpretation and application. *See, e.g., infra* note 30.

9. As with all codes in the civil law system, the *General Provisions* may apply to all of the subdivisions of the code; in the case of juristic persons, the *General Provisions* of the whole Commercial Code apply, SHŌHŌ arts. 1-51; additionally, the *General Provisions* of corporate law will apply, SHŌHŌ bk. II, and sometimes the *General Provisions* of the Civil Code must be applied, *e.g.*, MINPŌ arts. 33-84.

10. Blakemore & Yazawa, *Japanese Commercial Code Revision—Concerning Corporations*, 2 AM. J. COMP. L. 12 (1953).

11. *See* Zadankai, *Kaisha-hō kaisei o megutte* (*Symposium: Concerning the Revision of the Corporate Law*), JURISUTO, Sept. 15, 1990.

the common-law system, consisting in part of state enabling statutes and of federal regulatory (public) law, and also of private law by way of private causes of action. The American corporate law is largely embodied in different state statutes with some diversity of language, rules, and case law interpretations, not to mention the federal overlay. Still further diversity may be expected by way of accruing and ongoing decisional law interpreting each state's statutes. Though Japan is developing significant case law, there remains a significant difference.

A second major systemic difference between American and Japanese corporate laws is that Japan's is a unitary system with one Commercial Code (including Book II on Corporations) for the entire country, whereas American enabling statutes are state laws. These vary from state to state, and there are thus fifty corporate statutes in the United States.[12] So, except for the federal securities regulations enacted in the 1930s, it is not possible to speak of American corporate law as such[13] when addressing a specific legal problem in one of the fifty states. Of course it is necessary to seek answers to these legal problems in the cases or provisions in the statutes of the specific state. For ultimate answers it is necessary to go to the supreme court of the specific state involved.

This said, two factors which have somewhat reduced the apparent diversity in American corporate law are worth emphasis. The first is the *Revised Model Business Corporation Code* (1984) sponsored by the Amer-

12. In fact, there are probably two or three hundred state statutes, because many states have separate laws for utilities, insurance, or banking corporations. For a survey of these complexities, see Conard, *An Overview of the Laws of Corporations*, 71 MICH. L. REV. 621, 624-31 (1973).

13. Recently, especially in the past decade, there has been unprecedented interest in, and American controversy over, corporate law. From this ferment have emerged two important national projects within professional lawyers' organizations attempting to reach their own consensus in matters of corporate governance. These are still in progress and are still controversial, largely because the future is obscure as to the basic role of equity finance in our large public corporations which are increasingly held by so-called institutions and managed by financiers rather than production people. Both projects center around the Model Business Corporation Act originally sponsored by the American Bar Association, Committee on Corporate Law, and published originally by the American Law Institute in the 1960s. The first of the new projects attempting to review and restate basic principles of corporate law is the American Law Institute project. *Principles of Corporate Governance and Structure: Restatement and Recommendations*, Revised Model Business Corporation Act, Tentative Draft No. 1 (Apr. 1982). The second project is a revision of the Model Act sponsored by the ABA Committee on Corporate Law. The Revised Model Corporation Law was published in 1988, REPORT OF THE COMMITTEE ON CORPORATE LAWS OF THE SECTION OF CORPORATIONS, BANKING, AND BUSINESS LAW OF THE ABA (Mar. 1983) and the ALI project is still publishing Tentative Drafts, *e.g.*, Tentative Draft No. 10 (Apr. 6, 1990). For a review and comparison, see Goldstein, *The Relationship Between the Model Business Corporation Act and the Principles of Corporate Governance: Analysis and Recommendations*, 52 GEO. WASH. L. REV. 501 (1984).

ican Bar Association (ABA). It has been followed to a great extent in the statutes of more than thirty-five states, and thus has had a unifying effect on states' corporate laws. Another unifying factor in American law can perhaps be identified in the work of the American Law Institute's project on Principles of Corporate Governance, which is important, ongoing, and too complex to measure in passing.

Two states especially influence American securities law. Delaware and California offer important variations in this area: California because it is such a large state with somewhat more concern in its law for shareholder protection, and Delaware because so many major listed corporations are established there to enjoy the flexibility which that state's law allows corporate management. Delaware has won the "race to laxity,"[14] though in the long competition, nearly all other states have gone the laxity route. New York also has many companies incorporated under its law.

Another unifying factor in American law is the Federal Securities Regulations, first enacted between 1933 and 1934.[15] These regulations, after nearly sixty years of accruing administrative and judicial experience, have become the matrix for new private actions (unknown in Japan) which enable firms or individuals to sue for damages or enforce management liabilities for fraud or other corporate rights and obligations. This federalizing process has produced a body of national corporate law, eclipsing the diverse state law in several areas of interstate commerce.

The federal laws and regulations are administered initially by the Securities Exchange Commission (SEC), an independent federal regulatory agency, without parallel in Japan except possibly the unique Fair Trade Commission (*Kōsei Torihiki Iinkai*) which is concerned with unfair trade practices and the antimonopoly law. Also accruing from the Federal Securities Regulations is an accumulation of case law refining these aspects of corporate law.

In a third area of comparison between Japanese and American corporations law, it is the Japanese law which is diverse and also more sys-

14. This is Professor Conard's phrase, which he adopted from Justice Brandeis' dissent in Louis K. Liggett Co. v. Lee, 288 U.S. 517, 558-59 (1933) (Brandeis, J., dissenting). For certain, the laxity trend has produced the governance problem. *See* Conard, *supra* note 12, at 631-38; *see also* Romano, *The State Competition Debate in Corporate Law*, in CORPORATE LAW AND ECONOMIC ANALYSIS 216-54 (M.L. Bebchuck ed. 1990).

15. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78lll. *See* L. LOSS & J. SELIGMAN, SECURITIES REGULATION (3d ed. 1989-90); Sargent, *A Sense of Order: The Virtues and Limitations of Doctrinal Analysis*, 104 HARV. L. REV. 634 (1990) (this is a useful review of the monumental treatise by Loss and Seligman).

tematic. What its significance is, if any, to the securities trade, is difficult to assess in the abstract. But it is an important feature in the background.

Book II of the Japanese Commercial Code provides for three types of juristic persons (*hōjin*): the partnership corporation (*gomei-kaisha*),[16] limited partnership corporation (*goshi-kaisha*),[17] and the stock corporation (*kabushiki kaisha*, KK).[18] In addition, the limited liability company (*yugen-kaisha*, YK)[19] was established by special statute in 1938. Only the KK is designed to be a publicly held entity with shares listed and sold on the stock exchanges. The practice has departed from the design, however. Nearly a million tiny close corporations have been organized as KK, eschewing the legal entities provided for them in the law. Of course, none of them are listed.

In contrast, the corporate laws of the several American states have never envisaged but one corporate form, perhaps because, historically, partnerships were widely used and well-developed in practice and in the common law for small businesses and the professions. Practice soon necessitated special formulae for close corporations,[20] presumably as much for tax reasons as for limited liability. More than half of the state statutes contain special provisions or options for corporations with only a few shareholders, all or most of whom are to be active in the management of the corporate business. Nevertheless, the American law has not developed the dichotomy between public and private companies such as the German GmbH adopted by Japan.[21] Generally, American business

16. SHŌHŌ arts. 62-145.

17. *Id.* arts. 146-164.

18. *Id.* arts. 165-456.

19. Yugen-kaisha-hō (Limited Liability Company Law), Law No. 74 of 1938.

20. Until the last 25 or 30 years, the close corporation has been a stepchild in American law. Close corporation has been but a term of convenience. Only recently has it begun to appear in statutes with new legal significance. *See* F. O'NEAL & R. THOMPSON, O'NEAL'S CLOSE CORPORATIONS (3d ed. 1987) (standard work). DEL. CODE ANN. tit. 8, §§ 341-356 (1974) was perhaps the first state statute to define and treat in detail close corporations as a separate legislative problem, though North Carolina and Florida pioneered in scattering helpful provisions in their general corporate laws. For a recent history of close corporations in the various American states, see Karjala, *An Analysis of Close Corporation Legislation in the United States*, 21 ARIZ. ST. L.J. 663 (1989). In Japan, the LLC is governed by a special statute, Yugen-kaisha-hō, *supra* note 19, but many entities are incorporated, instead, as stock corporations (*kabushiki kaisha*, KK). Many lucid comparative insights may be found in Shishido, *Problems of the Closely Held Corporation: A Comparative Study of the Japanese and American Legal Systems and a Critique of the Japanese Tentative Draft on Close Corporations*, 38 AM. J. COMP. L. 337 (1990); D. HENDERSON, RETHINKING THE CLOSE CORPORATION IN JAPAN (1990); Karjala, *The Closely Held Enterprise Under Japanese Law*, 7 B.U. INT'L L.J. 229 (1989).

21. The German *Gesellschaft mit beschränkter Haftung* (GmbH) is a juristic person spe-

corporate law envisages a single type of juristic person. But the general corporation must be tailored by contract and by provisions in the bylaws or articles (under special statutory rules in most states) for convenience in forming a close corporation, which until recently[22] was not a formal legal term in the statutes.

A new classification of KK was created in 1974 by amendment to the Commercial Code and by special statutes[23] enacted at the same time. Further amendments took place in 1981.[24] Under these changes all KKs are classified by size into three classes, each of which has different auditing regimes of increasing strictness by size:

1. 500 million yen or more in capital, or over twenty billion yen in borrowings;
2. 100 million yen to 500 million yen; and
3. under 100 million yen.

This reform in some ways resembles the additional auditing and accounting practices imposed on listed corporations by federal securities regulations in the United States, though the statutory methods and enforcement techniques are quite different.

The fourth systemic difference between the U.S. and Japanese corporate laws is the rigid mandatory nature of the Japanese code. This raises theoretical questions concerning the basis of a corporation and the role of contracts in its underpinning, an issue of great interest in both countries, particularly among academics, in recent years. In Japan, this rigidity of mandatory provisions is found primarily in the KK. Designed specifically to be a publicly held corporation, the KK is much more rig-

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cially designed for a limited number of shareholders and for situations similar to American close corporations. The GmbH was the model for the Japanese limited liability company (*yugen-kaisha*). In English, see Oliver, THE PRIVATE COMPANY IN GERMANY: A TRANSLATION AND COMMENTARY (2d ed. 1986), for a description of the German GmbH.

22. DEL. CODE ANN. tit. 8, §§ 341-356 (1974). These 16 provisions are applicable to close corporations, as defined in the law, and comprise subchapter XIV of the Delaware Code. *See* Karjala, *An Analysis of Close Corporation Legislation in the United States*, *supra* note 20, at 670 (1989).

23. Shōhō no ichiba a kaisei suru hōritsu (Law to Amend a Part of the Commercial Code), Law No. 21 of 1974; Kabushiki kaisha no kansa nado ni kansuru Shōhō no tokurei ni kansuru hōritsu (Law on Special Cases under the Commercial Code on the Audit of Stock Corporations), Law No. 22 of 1974; Shōhō no ichibu o kaisei suru hōritsu to no shikō ni tomonau kankei hōritsu no seiri ni kansuru hōritsu (Law Concerning Adjustments in Related Laws Accompanying the Enforcement of the Law to Amend a Part of the Commercial Code), Law No. 23 of 1974.

24. Law No. 74 of 1981. For a summary of the 1981 amendments to this law and other aspects of the Commercial Code and special laws, see Motoki, Kosugi, & Johnson, *Explanation of the Amended Stock Corporation Law*, 2 JAPAN BUS. L.J. 309 (1981).

idly structured by mandatory rules and less subject to change by agreement than corporations set up under most American state statutes.

The following aspects of the KK are worth emphasizing: (1) the Japanese formation procedures are very formal as to initial organization, capital pay-in, and registration procedures for the charter;[25] (2) major changes such as amendments, mergers, and sale of assets require high fixed minimal votes and the like;[26] (3) accounting provisions in the Commercial Code are similarly formal and rigid compared to American statutes, though the SEC rules largely bridge this gap in the circumstances covered by federal law.

B. Micro-Comparisons

Switching now from macro-comparisons of the corporate law systems to micro-comparisons within the KK and the U.S. corporation, it is important to highlight a few salient differences of interest to those dealing with corporate law and securities. Of a multitude of such micro-differences in the rules and corporate institutions, the following features will at least indicate the importance of this aspect of harmonization. The features listed are only the more prominent humps and bumps, spots and stripes, which distinguish these two legal beasts. Taken together, they should be of interest to foreign investment counsel from both nations, though this listing is only indicative of many other corporate problems. Of course, a uniform corporate law such as that under consideration in the European Community[27] would be an ultimate solution for global trading, enabling the United States and Japan to trade shares with the same legal characteristics. The characteristics are as follows:

a. The legal conception of the KK, as noted, is a more mandatory structure, relatively less malleable by contract than the American corporation.[28]
b. In the KK, formation is formal and rigid, with a number of specified

25. *See* Henderson, *Threshold Advice to American Incorporation in Japan*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 76 (J. Haley ed. 1978).

26. D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES ch. 13 (1985) [hereinafter D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN].

27. Work on the European Corporation law is reviewed in Carreau & Lee, *Toward a European Company Law*, 9 NW. J. INT'L L. & BUS. 501 (1989).

28. For a review of the recent American literature on this debate, see Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989). *See also* Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989); Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

For materials comparing American and Japanese corporate law, see M. Tatsuta & D. Henderson, Japanese Business Corporation Law (mimeo ed. 1985) (available at the University

prerequisites which must be satisfied punctiliously before the corporation can be registered, come into existence, and begin business.[29] Recent amendments to the Commercial Code, effective April 1, 1991, have relaxed some of these rigidities. Examples of these rigid formalities in corporate formation of the KK are:

1. At least seven incorporators[30] (*hokkinin*) must sign the charter (*teikan*), and there must be at least one subscriber[31] besides the seven incorporators (eight in all) in order to avoid the onerous court approvals required to assure compliance with formalities when only incorporators participate in formation.
2. The corporation's purpose clause must specifically describe the business in which the corporation will engage. The catchall enumeration or the broad generalizations of American state law may be unacceptable at the Japanese Registry.[32] This makes ultra vires more of a concern in Japan than in the United States, though in litigation ultra vires is seldom found against defendants.[33]
3. Certain items can only bind the corporation if they are inserted in the charter.[34] These include:
   (i) contributions in kind;[35]
   (ii) benefits to be received by incorporators;[36]
   (iii) pre-incorporation arrangements by the corporation to take over property after it comes into existence; the property value and its transferor must be specified;[37] and
   (iv) incorporation expenses to be borne by the new

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of Washington); M. Tatsuta & R. Kummert, Cases and Materials on Japanese and U.S. Business Corporation Law (mimeo temp. ed. 1988) (available at the University of Washington).

29. *See* D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN, *supra* note 26; SHŌHŌ art. 165.

30. The Japanese term "*hokkinin*" is translated "promoter" in EHS, but "incorporator" is preferable; *hokkinin* had quite different roles from our promoters. The standardized English equivalents, which I use for Japanese legal terms, may be found in D. HENDERSON, J. HALEY & F. RAND, A JAPANESE-ENGLISH GLOSSARY (1985). Note that the recent amendments to the Commercial Code, effective April 1, 1991, have abolished the requirement seven incorporators; only one will be required.

31. SHŌHŌ art. 173.

32. For judicial discussion of ultra vires, see Arita v. Kojima, 24 Minshū 625 (June 24, 1970), *aff'g* 19 Kosai Minshū 7 (Jan. 31, 1966). English translations, T. HATTORI & D. HENDERSON, CIVIL PROCEDURE IN JAPAN B-24 (1985).

33. Takeuchi, *Kaishah ni okeru ultra vires no gensoku wa dono y ni shite haiki subeki ka?*, 1965 AMERIKA HŌ 20 (English translation by Henderson, *How Should We Abolish the Ultra Vires Doctrine in Corporation Law?*, 2 LAW IN JAPAN 140 (1968)).

34. SHŌHŌ art. 168.

35. *Id.* art. 168(5).

36. *Id.* art. 168(4).

37. *Id.* art. 168(6).

corporation.[38]

4. Before presentation to the Registry office, the charter must be notarized by a public notary (*koshonin*) and registered at the notary's office to assure compliance with all code requirements.[39]
5. One-fourth of a KK's authorized capital[40] must be paid into a designated bank account. The bank must certify its receipt before the Registry of the Ministry of Justice will formally register the company.
6. Court appointed inspectors must approve contributions in kind[41] and their values—a cumbersome, fixed procedure which takes time.

All of these and other rigidities of Japanese corporate formation law contrast sharply with the simple filing of a document of incorporation (often by a single incorporator) under American state statutes. Functional equivalents of these Japanese constraints on pay-in of capital are found in the United States, only in the federal securities law, if at all.

c. The issue of the validity of promoters' contracts, in the American sense, is not a concern of Japanese corporation law. Only incorporators' contracts listed in a corporation's charter bind the corporation after it comes into existence. Otherwise, only promoters are bound in transactions intended for corporate formation. The promoter's liability is derived from the Civil Code[42] on obligations, not the corporate law.

d. It is probably fair to say that the implementation of corporate democracy by the shareholders' meetings of large corporations is the major unsolved problem in both the U.S. and Japanese corporate law systems, and resides at the core of the ongoing discussion of corporate governance. In both nations, shareholders must and do rely on representation by management. Issues genuinely contested by shareholder votes are exceptional, and center around rare intraboard rivalries expressed by a proxy contest. Recent American institutional investors' use of the proxy system[43] has not been emulated in Japan.

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38. *Id.* art. 168(7).

39. *Id.* art. 167. Note that the Japanese public notary (*Koshonin*) is a much more structured official of civilian origin than our notary public.

40. *Id.* art. 166, ¶ 3.

41. *Id.* arts. 173(1), 181(1). This requirement will be relaxed under the 1990 amendment, effective in 1991.

42. MINPŌ bk. III.

43. *See Institutions Expected to Pursue Shareholder Proposals Agressively*, 21 Sec. Reg. & L. Rep. (BNA) No. 21, at 202 (Feb. 3, 1989).

Otherwise, shareholders concerned about mismanagement simply vote by selling on the stock exchange. Even the rash of leveraged buy outs, takeovers, and tender offers in America in the 1980s is but another manifestation of voting by selling as the only meaningful expression of shareholder concern. The fact that control is in essence, a stake, raises a host of other unrelated issues related to minority protection.

Equity (and therefore the shareholder) is not nearly as important in Japan as it is in the United States; rather, debt is predominant. This lends to another difference: Japanese management manages shareholders differently, not in law, but in practice. One management technique is the "stable shareholder," explained more fully below, which is implemented by cross-shareholdings within the establishment. Another technique is more directly concerned with the managing of shareholder meetings, and centers around a professional shareholder. These *sokai-ya*, or shareholder meeting operators, extort favors from management in exchange for not causing trouble at shareholder meetings, or for facilitating, by a sort of guerrilla tactic, smooth and short shareholder meetings. By 1981 *sokai-ya* practices had become truly institutionalized in many corporations. The purpose of *sokai-ya* is to enable management to avoid criticism and to get through meetings quickly, generally under thirty minutes.[44]

In 1981 attempts were made, by amendment to the Commercial Code, to thwart the illegal activities of *sokai-ya* and managers alike. The changes have apparently been successful to curtail, if not completely eradicate, the *sokai-ya*.[45]

In the American practice there has been no exact equivalent to *sokai-ya* working with management to manage the shareholders. But in the 1980s plenty of management and financial practices were costly to the public shareholders, not to mention the taxpayer. There are ample ill-defined conflicts of interests and malpractices of management which the law has yet to fully sort out and rectify. In the areas of leveraged buy outs, two-tiered tender offers, poison pills, green mail, and golden parachutes, as well as programmed trading, insider trading, and savings and loan fiascos accompanied by junk

44. A good summary of the *sokai-ya* institution before the 1981 amendments is found in Japan v. Yasumo, 23 KEISHŪ 1359 (Oct. 16, 1969), a criminal case wherein SHŌHŌ arts. 494(1)(1) and (2) were applied to convict a corporate officer who dealt with *sokai-ya*.

45. SHŌHŌ arts. 294-2, 237-4(3), 497. *See* Takeuchi, *Shareholders Meetings Under the Revised Commercial Code*, 20 LAW IN JAPAN 173 (1987).

bond speculations, a host of legal problems have been raised in the courts, running about a decade behind the fast deals. Thus, American individual shareholders have their problems too, despite the absence of the *sokai-ya*, and the general shareholder meeting certainly holds little promise of becoming useful to the ordinary shareholder any time soon. There is, however, an enormous difference in the use of equity finance in Japan and the United States, and therefore in the role of the shareholder. The difference inheres in the sociology of the corporate world and the mechanisms of finance within the politico-business establishment.[46]

e. As in America, the board of directors in Japan is responsible for management of the corporation,[47] though the Japanese board is normally made up of insiders who are corporate managers as well.[48]

Strictly speaking, Japanese directors do not have fiduciary duties. The duties of American directors are derived from trust principles, in turn derived from the historical Anglo-American division of law and equity. Equity of this sort is, of course, unknown to the civil law tradition.[49] Instead, the Japanese director's duties to the corporation are defined in terms of the law of mandates[50] from the Civil Code, and special provisions in the corporate law define other duties.[51] Whether the differences in abstract verbal formulae make for any distinctions between U.S. and Japanese practice is questionable, given massive U.S. legal dilution in the name of the business judgment rule.

Similarly, there is no provision in the Japanese Code for an American-type executive committee (or other committees commonly provided for in American law, articles, or bylaws). In fact, senior directors with informal designations as officers usually act collec-

46. *See infra* text accompanying notes 79-93.

47. SHŌHŌ art. 260.

48. For control and management of the KK, see Tatanta, Governance and Shareholders' Rights under the Corporation Law, in M. Tatsuta & R. Kummert, *supra* note 28, at 5-1-18, 6-112.

49. Kondo, *The Management Liability of Directors*, 20 LAW IN JAPAN 150 (1987). The dilution of the fiduciary duties of the American boards of large American corporations is still a problem, crying for solution. *See generally* Takeuchi, *Should There be a General Provision on the Social Responsibility of Enterprises in the Commercial Code*, 11 LAW IN JAPAN 37 (1978) (general aspects of the Japanese debate); C. Heftel, *Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations*, 5 U. HAW. L. REV. 135 (1983).

50. MINPŌ arts. 643-56.

51. SHŌHŌ arts. 254-3, 264, 265, 266(1), 293-5(5). *See* Kondo, *supra* note 49.

tively as a management committee (*jomukai*).[52] Other committees may be set up by special informal rules of the board.

The Japanese corporate law does not provide for a set of officers elected by the board with specific authorities and duties, as in American law. In Japanese practice, the corporation may have (indeed usually does have) a president (*shacho*), vice president (*fuku-shacho*), and other officers. These positions are informal and are mandated by board rules, but are not defined as such in the Commercial Code.

Instead, the Commercial Code provides for a legal agent elected by the board of directors[53] and designated by law as the Representative Director (*daihyō torishimariyaku*). He must be registered as such at the branch office of the Ministry of Justice. As the code is structured, he alone is the officer with authority to bind the corporation. Other officers may do so by power of attorney or by apparent authority,[54] subject to recent limitations to the effect that certain actions may not be delegated by the Board to a single director.[55]

f. The Japanese Code provides for no formal bylaws as found in American corporations. Informal rules, if they exist at all, are creatures of optional board actions, and do not provide for variations in the decision-making process, such as quorums, votes, or shifts between corporate committees, directors, or shareholders, as is often allowed by state statutes in the United States.

g. There are some major differences between the Japanese and U.S. legal systems for large public corporations. The formal differences, not discussed in this Article, include substantive variations, as well as differing means and, indeed, differing degrees of legal enforcement.[56]

The Japanese Commercial Code provides for a corporate ac-

52. For managing directors' meetings (*jmukai*), see M. Tatsuta and R. Kummert, *supra* note 28, at 6-112.

53. SHŌHŌ art. 261.

54. *Id.* art. 262.

55. *Id.* art. 260(2).

56. *See* Baum, *Japanese Capital Markets: New Legislation*, 22 LAW IN JAPAN (1989) (assessment in English of Japan's recent rules for insiders); Note, *Regulation of Inside Trading in Japan*, 89 COLUM. L. REV. 1296 (1989) (authored by Tomoko A. Kashi); K. OKAMURA & C. TAKESKITA, LAWS AND REGULATION RELATING TO INSIDER TRADING IN JAPAN (Tokyo 1989) (part I includes English translations of the new ministerial ordinances; part II is a synopsis of the changes; and part III has the laws in the official Japanese language). For pre-amendment law, see Ishizumi, *Insider Trading Regulation: An Examination of Section 16(b) and a Proposal for Japan*, 47 FORDHAM L. REV. 449 (1979).

counting officer known as an auditor (*kansayaku*),[57] and for special accountant auditors (*kaikei kansanin*) for larger corporations,[58] all of whom are perceived as representing the shareholders' interests inside the corporate law, and not in the regulatory law as American certified public accountants (CPAs) are. The Commercial Code also requires reports (balance sheets, profit and loss statements, proposals for distribution of surplus profits, and operating reports) to issue from the board to the auditor (and accounting auditor), and then to the shareholders for approval.[59] These reports must be approved by the board and the auditors (and accountant auditors) before they are presented to the general shareholders' annual (in practice often semi-annual) meeting.

These provisions for accounting and operational supervision by auditors within the KKs become more stringent for KKs of larger capitalizations (or borrowings). The law requires that CPAs staff the accountant auditor's positions.[60] Powers of examination and supervision of directors' operations are also included in the laws.

Without elaborating here on the considerable complexity of these accounting mechanisms within the Commercial Code and subsidiary statutes, it is sufficient to state that accountability is built into the Commercial Code and special statutes for corporations, rather than imposed largely from the outside by regulatory law as in the American federal rubric.[61] Japanese law does, however, impose further regulation of accounts, and mandates disclosure for listed corporations, by way of the securities regulations,[62] which are patterned after the American practice. Prior to various amendments

57. SHŌHŌ arts. 273. *See* Motoki, Kosugi, & Johnson, *supra* note 24.

58. Large corporations are those with 500 million yen equity capital, or borrowings of twenty billion yen. Smith, *The 1974 Revision of the Commercial Code and Related Legislation*, 7 LAW IN JAPAN 113, 120 (1974); *see also Kabushiki keisha no kansa tō ni kansuru shohō no tokurei ni kansuru hōritsu* (Law for Special Exceptions to the Commercial Code Concerning Audits of Stock Corporations), Law No. 22 of 1974, art. 2 [hereinafter Law No. 22 of 1974].

59. SHŌHŌ art. 281.

60. Law No. 22 of 1974, arts. 2, 4.

61. *See* L. LOSS & J. SELIGMAN, *supra* note 15, at 687-743 (1989). Note however, that the ABA recommendations for an audit committee within the board of directors, comprised of outside directors, are a similar attempt to avoid management's (inside directors') self-serving control of audits. *Corporate Director's Guidebook*, 32 BUS. LAW. 5, 36 (1976).

62. Shoken torihiki-hō (Securities Exchange Law), Law No. 25 of 1950, art. 193-2(1). *See* M. TATSUTA, SECURITIES REGULATION IN JAPAN 57 (1970). For an authoritative commentary, see W. HORIGUCHI, KOMMENTARU SHOKEN TORIHIKI-HŌ (rev. ed. 1985). *See also* JAPANESE SECURITIES LAW (L. Loss, M. Yazawa, & B. Banoff eds. 1983) (the material in this book is largely from the 1970s and not up to date, but it contains much valuable information in English.)

in 1974 and 1981, the CPA's audit, under the Japanese securities regulations, occurred after the shareholders had approved the board's accounts as reported to them by the board and examined by the auditor, making it difficult to rectify errors at that late date.

The securities regulations are administered by the Ministry of Finance, not an independent regulatory agency such as the SEC. The workings of Ministry surveillance are not transparent, and there has been only very exceptional judicial involvement to date.

h. Major corporate changes (charter amendments, mergers, sales of assets, dissolution, and the like) cannot be made in the KK by less than a two-thirds vote of a quorum (majority of issued shares).[63] This mandatory vote can be enlarged but not reduced by its charter. This system is consistent with the overall rigid and mandatory conception of the KK. According to the weight of Japanese authority, votes more onerous than two-thirds for major classes in the KK may be required by its charter. Of course, the interplay between charter and bylaw provisions in allocating power and fixing decision making processes is not available in a KK because the Code does not provide for bylaws. Bylaws which act as a repository of decision making rules, and which are sometimes changeable by the board of directors, are a convenience to American management not found in Japan, where either no change is permitted at all in Code vote or quorum rules, or changes must be made in the charter.

i. Japanese laws require that directors' remuneration also be approved by the general shareholders' meeting.[64] This is done by the board in the United States, and sometimes a special committee is involved. Only recently has there been an American move to address this widely perceived conflict of interest by setting up compensation committees of outside directors.[65] Compensation of directors of public corporations is several times higher on average in America than in Japan.

The foregoing listing of distinctive features that differ in the United States and Japanese corporations, while not intended to be exhaustive or systematic, conveys a sense of the importance of the uniformity of securities markets as a long-term goal. This uniformity will facilitate trading in legally similar shares of a legally similar entity across national boundaries.

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63. SHŌHŌ arts. 245, 342, 343, 405.

64. *Id.* art. 269.

65. *Corporate Director's Guidebook*, *supra* note 61, at 36.

III. SOCIAL DIFFERENCES INSIDE THE U.S. AND JAPANESE CORPORATION

As reviewed briefly above, it is evident that the basic conception, statutory structure, and specific legal features, as well as the juristic method, of Japanese corporate law differ considerably from the American counterpart. The differences in actual government and business practices surrounding the corporation, however, are even more contextual and striking. A few of the more salient points of contrasting corporate culture and sociology are discussed below. Despite their continuing importance, these differences are constantly changing, and vary with time and specific circumstances.[66] Only the outstanding features can be suggested somewhat impressionistically.

A. The Familial Firm

At the level of the firm, Japan has had distorted labor and capital markets. As implemented in the Japanese business structure, the post-World War II American styled imports of labor law, antitrust law, and securities regulations are puzzling to the American visitor. Japanese businessmen have the same difficulty when exploring these basics of business regulation in the United States. Even though the Japanese closely followed American verbal models when they were enacted during the Allied Occupation (1945-1952), the Japanese laws work quite differently. Indeed, they hardly work at all, in the American sense. However, the alternative methods used in Japan, which largely circumvent American expectations of these laws, have worked quite well for Japan in international competition.

Actually, under these laws, the Japanese labor movement never developed the stand-off between union labor and management, characteristic of the American industrial relations regime. The reason, in a word, is the captive enterprise union (*kigyō-kumiai*).[67] By use of the enterprise union, labor relations are confined within the company and follow a

66. *See* H.J. SHAPIRO & T. COSENZA, REVIVING INDUSTRY IN AMERICA: JAPANESE INFLUENCES ON MANUFACTURING AND THE SERVICE SECTOR 3-30 (1987) (this description of the familial firm and the family of firms is drawn from D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN, *supra* note 26, ch. IV); *see also* Kenkyu, *Kigyo no hoshakaigaku (Legal Sociology of the Enterprise)*, 38 HOSHAIKAIGAKU 87 (1986). For an overview of ways in which the Japanese system (enterprise union, seniority promotion, life employment, etc.) has changed in the 1980s and may change in the future, see Aoki, *The Japanese Firm in Transition*, in 1-3 THE POLITICAL ECONOMY OF JAPAN: THE DOMESTIC TRANSFORMATION (K. Yamamura & Y. Yasuba eds. 1987) [hereinafter POLITICAL ECONOMY OF JAPAN].

67. *See* Shirai, *A Theory of Enterprise Unionism*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 117 (T. Shirai ed. 1983).

more Confucianistic, familial model.[68] There were exceptions to this general attitude in the early years, and even now, evidenced by the government employee unions. The recent privatization of the National Railway System has already rid commuters of some of the inconveniences of American style antagonism in labor relations. The teachers' union is perhaps the prime remaining example of western styled leftist labor confrontation in Japan.

In private business however, the Japanese enterprise union has become the key bargaining unit. It is more cooperative than combative for reasons that are obvious, after careful scrutiny of the sociology within the company itself. It is because the company is more of a community, in which labor is not simply a commodity or a cost of doing business. In this sense, workers, along with the managers, are really members of the communal company. Ideally, they are employed for life. In fact, during the high growth of Japanese industries, and especially in the large export companies, this ideal has largely been realized for a core of stable employees. These permanent employees stay with the company and know that their own future depends on the success which their labor can cause the company to enjoy. The same is true of managers, who are also lifetime members, and who generally do not move from company to company for a price. Managers can therefore invest in training and in caring for their labor because they will all stay with the company and will return favors. Opportunities for lateral career moves are decidedly lower and, indeed, managerial reluctance to hire laterally helps generate the familial form.

Also, part of this system is the use of temporary employees, often quite numerous, who earn lower pay, and are disproportionately female. These employees are not "members"; they serve as an employment cushion because they are the ones laid off in a downturn. Small subcontracting firms serve a similar function. Both temporary employees and subcontractors receive second class treatment, yet their second class treatment is also part of the system. Due to necessity, they tolerate their insecurity and low pay.

One contributing factor to this situation is the fact that Japanese corporations need to pay much less attention to shareholders, so that in no small degree the business is run for power and market share, or for the privileged permanent work force and the corps of elite managers. In such a setting, imported American labor law, premised on a union-man-

68. Murakami, *Ie Society as a Pattern of Civilization*, 10 J. JAPANESE STUD. 281, 356-57 (1984).

agement standoff, whether inspired by Marx or Gompers, was from the beginning a misfit, and never worked in Japan like the "mother law" of Wagner Act vintage.[69] Unions that cut across company lines and enlist members from all companies in an industry or craft, and even intervene between labor and management with a permanent political agenda, never had a chance to gain the loyalty of Japanese company members. Loyalty, as well as the power to regulate workers' lives, remained with the lifetime company employer. The Japanese Socialist Party, Communist Party, and others seeking the political support of labor, have tried to exploit a more divisive stance, but they have always remained a decided minority, unable to command enough general support to govern even in a coalition. The only recent exception is the majority that these elements have been able to wrest from the ruling Liberal Democratic Party, though only in the upper House of Councillors.

Another contributing factor to the strength of the familial firm is that the loyalty of the lifetime employee has been earned by a systemic slighting of the lesser companies and temporary employees, as well as of the shareholders of Japanese listed corporations (from an American standpoint, there is no equal protection).[70] Slighting of shareholders is something that students of American corporate law can hardly fathom. American corporate theory is not communal, but is grounded in property concepts which dictate that American corporations are run for the owners (the shareholders). This translates into a short-term focus by American managers on quarterly dividends. American dividend goals cause a natural conflict of interest in the relationship between managers to shareholders on the one hand, and to employees on the other. Wages must be minimized in order to raise dividends for the boss, the shareholder. The American shareholder's tendency to vote at the stock exchange keeps managers focused on dividends. While actual shareholder voting is effectual only exceptionally in the United States and Japan, in the United States the shareholder's interest in dividends is paramount.

This elemental American corporate theory has no cogency in Japan for two reasons. First, the core shareholders in virtually all large corporations, so-called "stable" shareholders, form a solid controlling (though rarely a majority) group of shareholding financial institutions, banks, insurance companies, and other industrials (primarily sister companies) in a combination known as a *keiretsu*. Overall, in 1989 less than twenty percent of listed shares were held by private investors; business corpora-

69. *Cf.* W.B. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 162-66 (1984).

70. J. ABEGGLAN & G. STALK, KAISHA: THE JAPANESE CORPORATION 201 (1985).

tions held thirty percent and financial institutions (banks and insurers) held forty-four percent. Foreigners held four percent. While institutions in the United States hold about seventy percent of listed shares as well, the Japanese institutions are related sister business corporations, and are not pension and mutual funds.[71]

These stable shareholders assure the corporate management, who are essentially the directors as well, of their control and their positions. The motive for this manner of shareholding is not the maximization of dividends, but rather simple control and price appreciation, which has been obligingly ongoing throughout the last two decades until 1990. By cross-holding each other's shares (and thus effectively removing them from the market),[72] each company is largely free from outside shareholder influence on management.

In this establishment of collective supercorporatism, which centers around public banks controlled by nonlegal administrative guidance, management's major constituencies become the employee members and the banking institutions. Nurtured by preferences from the Ministries and the Bank of Japan, this constituency provides most of the corporations' capital by loans, rather than by shareholders' equity investments. This financing pattern, though prevalent in the 1960s and 1970s, is waning in many successful exporting firms which are now able to generate much of their own capital without borrowing much from the banks. Firms can also tap the new and still controlled bond markets of the late 1980s.

A second factor which discredits American corporate theory in Japan is the debt/equity ratio. Historically since World War II, Japanese companies have been so highly in favor of debt (typically eighty-five to ninety percent) that equity has not been of great financial concern. Ironically, much of the leveraging in the 1980s in America seems to be in recognition of the merits of this Japanese preference for debt. As long as loans are forthcoming and dividends continue at a standard stable per-

71. *See* TOKYO STOCK EXCHANGE, FACT BOOK 60 (1990); JAPAN SECS. RES. INST., SECURITIES MARKETS IN JAPAN (1990). See also Perry, *Who Runs Your Company Anyway*, FORTUNE, Sept. 12, 1988, at 140, for rising interest of pension fund managers in management of corporations whose stock they own.

72. Repeta, *Declining Public Ownership of Japanese Industry: A Case of Regulatory Failure?*, 17 LAW IN JAPAN 153 (1984). Only about 20% of the listed shares in Japan are held by private investors. The rest are held by institutions, but of a very different sort than American institutions (pension funds, mutual funds, insurance companies, and the like). The important difference is that the Japanese "institutions" are to a major extent sister companies or lending institutions, which hold not simply for investment but for power and control, and specifically to prevent acquisition, especially by foreign interests. As noted below, this is no minor matter.

centage of low par values in respect to approximate interest rates,[73] outside shareholders are docile and stable shareholders remain stable. This scheme is facilitated if the market continues to advance year by year, thus rewarding Japanese shareholders with long-term untaxed capital gains. The real source of capital is then comprised of retained earnings[74] and debt from bank borrowing. Banks are funded by the notoriously high savings of the people. For a long period, these savings were essentially forced by a combination of poor social security and no bank checking accounts or credit for consumers, as well as withholding of wages, later paid as a bonus.

So long as the interest is paid, a company can be run for the company and its members, both managers and other permanent employees.[75] What the forty percent drop in equity prices on the Tokyo Stock Exchange in the second half of 1990 may do to this scenario is difficult to predict, especially if the market drops still lower, or if world reactions cause greater protectionism targeted against Japanese exports.

Such has been the basic sociology of the typical large, governmentally nourished, export-oriented Japanese corporation listed on the exchange during the high growth period. Debt/equity ratios have changed somewhat, but the cross-shareholdings of the *keiretsu* is still a major factor which makes acquisitions and takeovers normally quite impractical, especially for foreigners. The debt/equity ratio is just one of the difficulties which makes Japan an uncongenial place for foreigners to start a business, because they must always start from nothing.

In securities markets, cross-shareholding and unenforced securities laws have meant that the exchanges are extensively used for speculation in a high velocity, rather thin market. One might suppose that the continued success of speculation will also depend on continued high growth, dependent in turn on the continued tolerance for Japanese exports in foreign markets with no reciprocation in Japan.

Another difference enhancing the large Japanese firms' export prow-

73. *See* Chandler, *Japan, Acting to Boost Firms' Dividends, Tells Underwriters to Pressure Clients*, Wall St. J., Nov. 7, 1990, at 11. It seems the "Ministry of Finance is putting the squeeze on Japanese companies that it believes skimp on dividends." *Id.* Between the lines this tells us much about the "guidance."

74. Akabori-Shibuya, *A Study of the Shareholders' Position in Public Issue Corporations*, 10 LAW IN JAPAN 101 (1977).

75. It has been argued that the public corporation financed by equity has outlived its usefulness in the United States, as the leveraged buy outs and takeovers show in the 1980s. The private corporations, financed by debt, and run by and for the management are the way of the future here as well as in Japan. Jensen, *Eclipse of the Public Corporation*, 67 HARV. BUS. REV. 61-74 (1989).

ess is the weakness of the consumer movement in Japan.[76] The consumers, like the employees, are all troopers. This is readily apparent to a tourist who prices any ordinary consumer item, especially if it is manufactured by foreign companies. Prices are uniformly high by American standards. Japanese consumers put up with prices that would surely cause a disturbance elsewhere. The most significant effect of their tolerance could be that the high prices at home act as a subsidy for the low prices charged abroad by Japanese companies to gain market entry. No one has been able to explore this possibility in depth, but the logic is there, given the high domestic prices and the size of the domestic market.

One reason for the high prices is that there are multiple layers of entrenched supernumeraries in the distribution system, which act as another impediment to the foreign salesperson.[77] Another reason for consumer tolerance of high prices is simply consumer's acceptance of the discipline imposed (like a kind of tax) upon them by the heavily producer subsidized consumer goods regime, bent on vanquishing more open competition abroad.

The point is that the simple, competitive market forces which exist abroad in a free, consumer-oriented economy, open to imports available to retail consumers at reasonable prices, do not cause Japanese management or retailers to lower consumer prices at home. There also is no incentive to solicit labor for reduced wages in order to reduce costs or to pay meaningful dividends to shareholders. The result is that, with shareholder and consumer interests largely removed to the sidelines, managers have only one concern—they can run the corporation for increased market share and for the benefit of their members, so long as they keep their bank loans paid. High depreciation, deductible interest, and other policy favors from government offer other advantages in this producer-subsidized, export-oriented polity.

B. The American Firm: Strictly Business

The sociology of the American firm and its several players—employees, shareholders, and consumers—is indeed different from the familial firm, though not necessarily better.

76. For other treatments of the issue, see R. CLARK, THE JAPANESE COMPANY (1979); R. COLE, JAPANESE BLUE COLLAR: THE CHANGING TRADITION (1971); R. COLE, WORK, MOBILITY AND PARTICIPATION (1979); R. DORE, BRITISH FACTORY—JAPANESE FACTORY (1973); T. ROHLEN, FOR HARMONY AND STRENGTH (1974); T. HANAMI, LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN (1979).

77. This issue was among the matters which Japan undertook to remedy in the Structural Impediments Initiative Agreement (SII).

The American labor relations regime is based on a labor market built from mobile individuals, not life-long members. The general rule is to pay for work and work for pay. As in Japan, union influence is declining in the American workforce, but the union attitude still prevails: do as little as possible for as much as possible, preserving as much leisure time as possible for shopping, consuming, and recreation. American managers, on the other hand, often treat individual workers as commodities, hiring and firing them like they buy and sell a ton of coal or a load of lumber. Perhaps this portrait is a bit too stark. Times are changing, but there still exists a residue of nineteenth century labor-management hostility in American industry, which is almost perfectly contrived to engender unproductivity.

Unlike Japan, American management in the 1980s increasingly consists of number crunching MBAs who move from firm to firm, upward and onward. If they stay with a firm, it is often in order to pull off a leveraged buyout, to sell off the corporation's assets, or even to dissolve the work force. This is unthinkable in Japan. In response to recent criticism of management techniques there may be a new emphasis on production managers, but the elite managers of the 1980s and 1990s have generally not been production people. The managers seem to essentially move money around, rather than producing quality products for a social purpose in order to sustain the corporation in competitive business.

Among American shareholders, except for raiders, there are precious few (aside from recent institutional investor activists) who hold shares for voting control, unlike the Japanese business establishment. As in Japan, over seventy percent of listed shares in the United States are held by institutions. But the institutions in the United States are not sister companies, and they care little about votes or control. They are pensions, mutual funds, trusts, and insurance intermediaries with their sights on the flow of income. This focus influences management, but the influence is often negative because it generates a short-term interest in quarterly dividends which keeps stock prices up. Coupled with the stock option method, which is meant to keep management interested and loyal, this short-term concern can be devastating for production and maintenance of market share over the long haul.

Unlike the Japanese consumer, the American retail buyer is not disciplined and docile. He is the king of the marketplace, and is noisy about barriers and prices. Americans have, and even cherish, their diversity. Nevertheless, in consumer tastes they are remarkably homogeneous. They buy the same jeans, eat the same hamburgers, and in general consume the same standardized products throughout the country, small lux-

ury markets aside. Furthermore, all these consumers are well-financed with easy loan payments and credit cards. Competitive shopping centers, discount houses, department stores, and other outlets abound with convenient parking lots. Stores are full of foreign and domestic products set side by side on the shelf or in the warehouse, or in automobile salesrooms, for easy price comparison. This market is a huge, accessible, and unique consumer's market subsidized by tax deductions and credit policies, antitrust enforcement, openness across the borders, and nondiscriminatory practices in the distribution chain. The United States subsidizes consumers and importers, not producers. These subsidies have created a bonanza for Japanese exports.

Little thought is probably given abroad to the heavy transaction costs that American exporters must pay in tailoring products to small, segmented foreign markets. In order to sell enough to balance off the sum of imports by sales to the many small, cash-and-carry markets of America's trading partners, American exporters must deal with multiple languages and cultural barriers, as well as small segmented officialdoms. Only half in jest, it could be said that, but for the service America offers to foreign sellers by way of its developed mass market, which is well financed and accessible, perhaps the United States should assess a surcharge to offset not only its own consumer subsidy costs, but also the absence of such conveniences from its trading partners' markets.

These contrasting profiles of the underlying sociology of the American and Japanese corporation are sharply drawn in order to support a final observation: a foreigner's acquisition of a Japanese communal type firm is practically unthinkable; it is like buying a community which is highly leveraged and pays few dividends. Acquisitions are important to convenient market entry, but are not practicable in Japan, the rare exceptions that exist notwithstanding.[78] Thus, perhaps the most serious barrier to foreign firms existing in Japan is the condition of being forced to always start from scratch, at the bottom of the ladder. This barrier occurs essentially because buying a share in Japan is not like buying one in New York. Shares are not fungible even legally, and less so sociologically.

78. For many insights into the difficulties of the Japanese takeovers, see Ramseyer, Takeovers in Japan: Opportunism, Ideology and Corporate Control, 35 UCLA L. REV. 1-64 (1987) [hereinafter Ramseyer, *Takeovers in Japan*]. For a list of Japanese companies acquired between 1955 and 1984, see K. ISHIZUMI, ACQUIRING JAPANESE COMPANIES 6-8 (1988). The most famous skirmishes by an American investor are T. Boon Pickens' experiences with Koito Mfg. Co., which appear in the news from time to time. Though the largest shareholder, he is excluded from the board. *See* Japan Times, Dec. 5, 1990, at 4.

IV. POLITICAL CONTEXT OF BUSINESS

The differences in the business/government relationship in the political context in the United States and Japan is, of course, difficult to capsulize. Nonetheless, there are some highly significant differences, some of which are outlined below.[79]

On the American side, the government has made the antitrust laws its prime concern in the business world. They are, in essence, America's economic constitution. The goal is to achieve free enterprise by maintaining free competition, both domestic and foreign. It would be a challenge to find any government with a more consistent dedication to a strong private sector, aside from Hong Kong perhaps. Certainly the government generally eschews entering businesses such as banking, airlines, utilities, and railroads, which are often public industries elsewhere. The U.S. government runs the post office and nurtures defense industries, though not all that well in the view of many. With these minor exceptions, Americans have placed their faith in the private sector, with a modicum of regulation and deregulation, and even some reregulation.

Few seem to trust Washington to pick the winners in America's industrial structure or to manage any other more positive industrial policy. Even so, it is obvious that we have an industrial policy, perhaps by default, and tax policies and other subsidies have had a large role in subsidizing debt, consumers, the over-building of offices, and the rash of takeovers during the 1980s. These policies contribute to excessive deficits, both public and private, not to mention the trade deficit.

At the same time, suspicion of big business is endemic in American society, which sustains a high level of support for antitrust enforcement despite the waxing and waning of resources dedicated to such, and despite the nation's rethinking of the ways to maintain international competitiveness. The United States is certainly wary of any kind of cartels or industrial associations (except labor unions) which would afford business any opportunities for price fixing or other forms of restraints on trade.

Beyond the U.S. borders, international competition on a level playing field remains a special and unsolved problem, and largely a romantic quest. In fact, only recently has it become apparent that the comparative advantage and the invisible hand of economics have given way to the

79. For a lucid synoptic review of the several models offered in the literature to explain the party-government-industry nexus, see Murakami, *The Japanese Model of Political Economy*, in POLITICAL ECONOMY OF JAPAN, *supra* note 66, at 56.

politics of "contrived advantage,"[80] produced by some nations' mercantilist attempts at employing their people at the expense of tilting the playing field. Attempts will continue, presumably, to address these issues bilaterally (as in the SII agreements), or multilaterally at General Agreements on Tariffs and Trade (GATT) meetings or elsewhere. But to date, the future of the free world economy is discouraging, as we can see from the latest set backs in the GATT round. And it seems that this experience may suggest problems in globalization of securities markets, too.

In Japan, politics and business are much more integrated. The business of government is business. As Mr. Peter Drucker[81] noticed earlier than other observers, Japan's trading tactics are also adversarial and power oriented; it is not just business that Japan is interested in, but control. National power by dominance of the market is the goal. This power game is played by using formidable government/business policies and unique organizational strategies. These strategies, labelled "insular internationalism" by this author in 1973,[82] have not gradually dissolved in the face of international criticism, but rather have remained a problem which has gone unaddressed in Tokyo and Washington. They were addressed recently in the SII agreements, though these agreements are probably not realistic solutions in their present form, or even in the short term. This is because the agreements merely identify fundamental domestic problems in both nations related to the level playing field, but realistic implementation of solutions is not specified.[83]

Japanese Supracorporate Business Organization[84]

As well as relying upon the docile consumer, the stable shareholder, and the familial worker, the Japanese industrial, export oriented, financial establishment is supported domestically by a cartel-like set of unique organizational forms as well. There are, in other words, not only familial firms, but also the families of firms, the *keiretsu*. While not susceptible to solution by our antitrust laws, they present problems for the outside competitor. Perhaps the organizational scheme should be treated as "quasi-state trading" rather than as "free enterprise."[85] This difference

80. Henderson, *Access to the Japanese Market*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY, *supra* note 2, at 131.

81. Wall St. J., Apr. 1, 1986, at 11.

82. D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN, *supra* note 26, at xi.

83. *See* Fingleton, *supra* note 2, at 72.

84. This section is drawn from D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN, *supra* note 26, at 91.

85. *Id.* We need a term for Japanese methods because free enterprise is inept to describe the Japanese method of dealing in the international arena. It has been called Japan, Inc.,

is not simply a matter of semantics; it would justify dealing with the Japanese complex, impervious as it is in manifold ways to foreign firms, under the rubric of state trading, which provides for compensating devices for dealing with contrived ultratransparent advantages, and for the lack of reciprocal opportunities.[86] The problem is not that the system does not work well for Japan: indeed, it explains much of the Japanese economic miracle. Rather, the problem is that the whole complex is too nationalistic and contrived to produce a protectionist response from Japan's trading partners. This destroys freedom in Japan's targeted overseas markets, unless of course trading partners are tolerant enough to allow their manufacturers to be put out of business.

Like personal relations within the firm, the large modern Japanese enterprise's relations with competitors and affiliates are organized, controlled, and hierarchical in nature. The effective structure reflects the fact that, since the Meiji period (1868-1912), modern industry has been an instrument of national policy for developing protected domestic markets and for winning markets abroad. When Japanese business was weak, these tactics were perhaps understandable, but now they are becoming a predatory and destructive form of mercantilism.

The overall posture is as follows. Within each industry, corporate participants are ranked by market shares, *i.e.* the "big three" or "big five." Each industry also has its trade association and cartels, both formal and informal, culminating in the *Keidanren* (Federation of Industrial Associations), which interfaces with government, as its partner in the game of international competition or conquest. Since much governmental action is channelled through it and turns on a firm's ranking and production and export goals, even MITI might be included at the apex of this business structure. Of course, all major nations have informal rankings for firms and have industry-wide associations.

But there is nothing in the United States like the Japanese melding

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adversarial trading, targeting, or insular internationalism, but some of these terms have been retired from the discourse as "Japan bashing"; still, Japanese tactics are not properly described as "free enterprise" because of that term's English meaning. Though not state owned, "quasi-state trading" is suggested for the methods of *keiretsu* to indicate the high level of governmental complicity on the one hand and tolerance for collusion among companies on the other, so that the outsider is confronted with something quite different than the usual competition between individual units of business found in the United States. For a new example of grappling with this intractable problem, see D. KENDRICK, WHERE COMMUNISM WORKS: THE SUCCESS OF COMPETITIVE COMMUNISM IN JAPAN (Tokyo 1990).

86. For state trading methods, see Allen, *State Trading and Economic Warfare*, 24 LAW & CONTEMP. PROBS. 256 (1959); Baban, *State Trading and the GATT*, 11 J. WORLD TRADE 334 (1977); Allan & Hiscock, *East-West Trade: The Philosophies and Practicalities of State Trading*, 8 MONASH U.L. REV. 135 (1982).

of business and government leadership (both politicians and bureaucrats) at the top. Business campaign funding, along with the gerrymandered rural vote, has kept the Liberal Democratic Party in power for decades. This business and political combination has, in turn, produced a steady growth and prosperity for Japanese business that is the envy of the world. Paradoxically, though Japanese banks and top businesses are wealthy, individual Japanese citizens are not, unless they travel abroad to consume. This should indicate the underlying purposes of Japanese policy. Paradoxically, it is the U.S. government, through the SII negotiations, not the Japanese government, which has tried to come to the aid of the Japanese consumer.

Another basic feature of the overall Japanese business hierarchy is the horizontal split between the giants at the apex and the microbes at the base, which populate respectively the modern and traditional (or subcontracting strata) of this dualistic economic pyramid. There are, for example, about one million KK corporations in Japan, and about the same number of YG, reflecting a per capita rate of business incorporation roughly the same as that in the United States. The big business world, consisting of approximately 1800 listed corporations with export prowess, is highly oligopolistic, with markets dominated by four to eight firms and quite exclusive (though less so than before World War II). In the early postwar years, the government's industrial policies efficiently shaped oligopolistic markets in most export products, with an eye towards competitiveness abroad. Significantly, the industrial, political, and bureaucratic national policymakers have had an admirable prescience to encourage moves toward the higher value-added industries, thus wisely refusing to support failing sectors.[87] This stands in sharp contrast to the American practice of protecting textile industries and the like.

Historically, a few selected firms were promoted and protected in importing high technology.[88] At the same time, foreign technology was inadequately protected by forced licensing or a toothless patent system,[89] the latter having been upgraded by stages only as Japan's own technology, whether foreign derived or otherwise, has come to require protection. These favored companies were allowed preferential financing,

87. *See* R. DORE, FLEXIBLE RIGIDITIES: INDUSTRIAL POLICY AND STRUCTURAL ADJUSTMENT IN THE JAPANESE ECONOMY 1970-1980, at 153 (1986).

88. *See* M. MORITANI, JAPANESE TECHNOLOGY: GETTING THE BEST FOR THE LEAST (1982). The FAX machine is but the latest of American inventions, the manufacture of which is exploited now almost exclusively in Japan. *See* Drucker, *Marketing 101 for a Fast-Changing Decade*, Wall St. J., Nov. 20, 1990, at A20, col. 3.

89. This too was addressed in the SII Agreement, *supra* note 7.

foreign exchange, and the critical foreign technology needed to build Japanese capacity in each successive line of profitable products before any foreign inventors could gain access to the market. The result was that, in the beginning, only Japan's manufacturers had access to both the American market and their own domestic market, the second largest in the world, from which foreigners were excluded by various means. This often meant that the advantage of scale (in both domestic and foreign markets) was possessed only by Japanese producers, who attacked the low-priced, mass-produced end of the product lines first. In addition, it is now well-known that, even after the restrictive foreign exchange law was changed in 1980 to allow foreigners more market access, the underlying social, business, and banking organizations have remained formidable barriers to foreign investment and acquisitions.

There are two kinds of supracorporate groupings in this unique organizational structure. First, most firms have joined into the *keiretsu*, wherein their shared banking and investing institutions ration out scarce investment capital and other services. We must emphasize that these *keiretsu*[90] are not family controlled firms like the prewar *zaibatsu* by the same names (e.g. Mitsubishi, Mitsui, Sumitomo). The postwar organizational principle is a confederacy using the "one-set" technique. This means that, typically, each *keiretsu* tries to nurture, besides its own service core, one major firm in each kind of manufacturing endeavor (an oil company, a trading company, an electrical machinery company, a mining company, and the like), so that there is a whole cross-industrial spread fostering much horizontal and vertical business within a group complex controlled by cross-shareholding and informal ties, but there is relatively less competition intramurally. A multitude of small subcontracting firms manufacture parts and render other services also allied to each major industrial; this subcomplex of the *keiretsu* is often called an "enterprise *keiretsu*." This small enterprise sector is subjected to the rigors of longer hours, inferior finance, less security, and lower pay. Americans could easily identify this treatment as a constitutional problem: the lack of equal protection.

The second kind of supracorporate grouping is the industry-wide association, which organizes competing producers in each industry for regular governmental liaison and cooperative action, including the crea-

90. *See* KIGYO KEIRETSU SORAN (Shukan Toyo Keizai ed. 1991) (showing in 752 pages of detail the labyrinthine mutual overlaps of stock holding, loan sources, and personnel exchanges in the Japanese corporate complex). There is a list of the leading *keiretsu* and their member companies as they existed in the 1970s in D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN, *supra* note 26, at 373.

tion of cartels[91] on a national scale. The goal is to increase the domestic edge against outsiders, especially in the purchase of raw materials. Numerous Japanese cartels function for export and import through these associations, especially in international business. The internal workings of these industry-wide associations are not transparent and remain as impervious to outsiders as to antitrust enforcement.

Both types of supracorporate organizations are remarkably elaborated in Japan to serve group or national purposes transcending the capacities of individual firms. They are remarkably free of antitrust enforcement.[92] Basically, the *keiretsu*, embracing no competitors, is like a headless conglomerate, without enough common ownership to tie it together at the top, but with enough cross-shareholding to fend off troublesome outside shareholders.[93] The trade associations and cartels, on the other hand, bring together all competitive producers in a given industry for governmental and industrial production and import-export strategies, as well as for investment allocations, orderly marketing, prevention of excess competition, or fortification at the business level against foreign invasions. Both of these supracorporate organizations are so crucial to operations that no Japanese firm would embark on an important venture without consulting the government, the banks, the trade associations, and perhaps the *keiretsu* presidents' meeting. Such factors affect, sometimes definitively, market shares that foreigners might hope to attain by acquisition, joint venture, or alliance. Certainly no foreign firm should venture into the Japanese business world without exploring the specifics of these supracorporate systems. Firms must be very concerned with the marginal position they would occupy in the Japanese economy when forced to start from scratch in such a closed complex.

What this all means for the local securities markets, and more importantly for global securities trading, is not yet apparent. Nor has the matter yet been adequately studied abroad, despite the attention it has received in the SII negotiations.

It seems clear enough that the joint government/business push abroad will be in financial power and control, not just trade or simple corporate profit. Funding for foreigners is still a major problem in Ja-

91. *See* Yamamura, *Success that Soured: Administrative Guidance and Cartels in Japan*, in POLICY AND TRADE ISSUES OF THE JAPANESE ECONOMY 77 (K. Yamamura ed. 1982).

92. *See* Iyori, *Antitrust and Industrial Policy in Japan: Competition & Cooperation*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY, *supra* note 2, at 56.

93. *See* Graven, *In Corporate Japan, Cross Shareholding Remains a Useful Defense Mechanism*, Wall St. J., Nov. 17, 1989, at A11 (regarding the Tokyu group).

pan, as is the price of business sites and a nearly unfathomable distribution system.

In sum, the Japanese business complex is a good and effective nationalistic system. But it is highly adversarial and market share and power oriented, and thus has more political overtones than are usually perceived by Americans who naturally think of the government as simply a referee and assume that the profit motive is the company's bottom line. Whether these peculiar Japanese methods are consistent with the idealism of a free enterprise based world economy is the real concern which has been recently debated abroad with increasing vigor.

V. FOUR CULTURAL CONTRASTS OF SIGNIFICANCE TO SECURITIES LAW

After reviewing some contextual differences (whether legal, social, economic, or political) in the methods of corporate business in the United States and Japan, a pertinent question arises: how many of these differences are explained by our respective cultures (*i.e.*, the language, religion, and philosophy, as embedded in popular values and attitudes)?[94] Interesting as the question may be, the purpose of this study is more limited.[95] We will discuss four cultural aspects which are especially sig-

94. This is a simple definition of culture for the purposes of this paper. There is, however, considerable debate among Japan experts about the extent of cultural influences on recent Japanese business successes. Much of the debate is simply semantics, or latently definitional (*i.e.*, what is culture, or more importantly to some single-causation exponents, the question is: What is causative and what is derivative?). Such academic categories (economic, political, social, legal, cultural, etc.) are only analytical conveniences at best, not really worth doing battle for, when a stipulative definition will usually do for the job of analyzing an ongoing interrelated single problem. It is thus convenient to emphasize these four topics at the end of this analysis and call them cultural factors for the limited purpose of raising the issues. They seem especially important to business comparisons. They are "cultural" because, though interactive with other aspects of Japan and the United States and though changeable over time being, derivative as well as causative, they are more abiding and slower and harder to change than some legal, political, and social contrivances or economic policies previously discussed. They do have enormous interactive effect on business in the two countries at any given time. For a very insightful treatment of litigation and its many barriers in Japan on antitrust, see Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan,* 94 YALE L.J. 604 (1985). Much of Ramseyer's message is equally relevant to litigation as a tool of securities enforcement in Japan.

95. Note that it is easy to explain too much by emphasizing the peculiarities of Japanese culture, but, whether the culture is causative or derivative is not the only question. Nor is it sensible to ignore differences in popular attitudes and beliefs while quibbling about the extent of their significance. For cogent economic analysis that shows the dangers of overreliance on cultural explanation, see Ramseyer, *Legal Rules in Repeated Deals: Banking in the Shadow of Defection in Japan,* to be published in 20 J. LEGAL STUD. (1991), and Ramseyer, *Takeovers in Japan, supra* note 78, at 2-6. Ramseyer's several works generally do much to illuminate the

nificant contextually to the way corporate business is done in both countries: (1) attitudes toward government (or authority, generally); (2) popular attitudes toward justiciable law; (3) attitudes toward business; and (4) the business/government relationship. All four of these are presumably nurtured by (and changing with) the ongoing social and cultural milieu.

In the main, the American tradition is to distrust authority and government.[96] American business, especially, doubts government's judgment in industrial policy, though it inconsistently and incessantly lobbies for special favors. The latest popular attitude towards taxes simply reflects a past consensus that government does not return value for the tax dollar. The people can get more for their dollar in the market. Americans believe in Lord Acton's maxim that power corrupts, and absolute power corrupts absolutely. In addition, Americans are very individualistic, and their society thus does not provide communal groups such as those in Japan, as alternatives to law for maintaining order and settling disputes.

In Japan, a traditional ideology supports a fundamentally different view of authority, especially of bureaucracy. More generally, government is seen by the populace as essentially paternal, competent, and trustworthy. In American rhetoric, Japanese view their governors (essentially the bureaucracy) like Plato's philosopher kings. Public servants are considered morally superior to private citizens;[97] they form a meritocracy based on academic prowess which leads them to the Law Department at Tokyo University, the main incubator of power in big business as well as in government. This can be traced directly to a political philosophy derived originally from Confucianistic thought. Its legitimacy is derived at the lowest social level, from power relationships to the paternal authority of the traditional family, which serves as a model and carries over to officialdom at higher levels. In this orthodox structure, rulers are presumed to be virtuous, wise, and beneficent. The mode of governance is thus based on status and authority; the method is strictly informal and administrative, rather than justifiably legal. Accordingly, hierarchy is all-pervasive in Japanese daily governance; duty and obedi-

interrelationships between the Japanese bureaucracy's dominant role through extra-legal guidance and litigation (justiciable law).

96. For a survey finding that 64% of Americans find the government less than trustworthy, see *Beltway Bashing Is on the Rise Again*, Wall St. J., Feb. 17, 1989, at A16, col. 1.

97. The slogan *kanson minpi* (making much of government and nothing of the people) expresses the elitist tradition well enough, and at the same time defines the difficulty of developing the important western idea of the "public servant" in the postwar bureaucracy.

ence to superiors is required. There is thus little concern with due process, a concept from another world.

In Japanese governance, administrative guidance (*gyōsei shido*), not justiciable law, is the predominant instrument of bureaucratic power. But administrative guidance should not be regarded as law. It is at best alegal, and at worst illegal.[98] It is in no way related to the rule of law in the regulatory area. Clear as this really is, there is still some muddled thinking about the concept of guidance. It needs to be understood particularly by foreigners, because guidance does not work well for the outsider who has no group to join and no authoritative beneficence to readily invoke.

Even though Japanese guidance may be congenial to Japanese conceptions of authority (and how it ought to be exercised), it must be clearly recognized in Japan and abroad as a major barrier to the legal clarity and predictability demanded by global security markets encompassing non-Japanese investors.

A. Law

While justiciable law is at the center of American culture, it is new, shallow, and of peripheral importance in Japan,[99] especially in business regulation. For better or for worse, individualism built on justiciable rights is the bedrock ethos of American culture. This means that justiciable law has a much higher value and deeper efficacy in American culture than it does today in Japan. Japanese are always selflessly immersed in their group, whether at home or at work. Perhaps this is why it is frequently said that "Japanese are equality-minded rather than liberty-minded."[100] These psychological differences are not easily perceived or

98. For a finding that MITI guidance was illegal in the Oil Production Restriction Case, and was therefore not a defense in this criminal case, see Japan v. Sekiyu Renmei, 983 HANJI 22 (Sept. 26, 1980).

99. A fresh and comprehensive analysis of the role of law in Japan may be found in J. HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (in press 1991). *See also* Fujikura, *A Comparative View of Legal Culture in Japan and the United States*, 16 LAW IN JAPAN 129 (1983) (M. Smith trans.); T.B. STEPHENS, THE CHINESE DISCIPLINARY SYSTEM: THE MIXED COURT OF SHANGHAI (in press 1991), for analysis and contrasts between a western legal system and the disciplinary system (without "law") used to maintain order and resolve disputes in the Confucianistic society of China. Stephens shows enough differences to support his position that both systems should not have the same English name (i.e., "law"). The position is cogent in discussing Japanese social control, as well as the activity of the bureaucracy by way of "administrative guidance." *See* Haley, *Introduction: Legal vs. Social Control*, 17 LAW IN JAPAN 1 (1984).

100. Okudaira, *Forty Years of the Constitution and Its Various Influences*, 53 LAW & CONTEMP. PROBS. (1990).

precisely measurable because they are imbedded in both nations' language, culture, innate patterns of thought, and behavior. Needless to say, attitudes towards authority and law are linked. Americans distrust government, so they rely on law to limit its power.

These attitudes condition the social impact of statutes, such as the securities laws, which often, on their verbal faces, appear as almost identical formulae for individual behavior in both Japan and the United States. But the impact of law on Japanese society is quite diluted; Japan is best seen as, in larger part, socially, and not legally governed.[101] Not to perceive this in the Japanese rhetoric and not to act accordingly, is, for the foreigner, simply to overlook the essence of Japanese governance.

Again, this is because law as an idea and law as an institution confirming justiciable rights, are concepts alien to Japan's administrative tradition; it was therefore new in 1875, when the first western-styled courts were instituted. Individualism, rights, law, and courts have required decades to become operational in society, even to the present degree. Of course, Japanese society has other, perhaps better, authoritative ways to channel behavior and resolve disputes. Indeed conciliation (*chōtei*),[102] the traditional social method of settling disputes, was moved into the courts and now operates to resolve a major portion of cases even when first filed as lawsuits. Such methods consist of intimate communal habits of maintaining traditional patterns of conduct based on authority and discipline, not law. This system is generally uncongenial, even incomprehensible, to outsiders at the threshold. Accordingly, entry as a member is extraordinarily difficult. On the other hand, outsiders, *as guests*, are exceedingly well treated. Their foreign business efforts inside Japan are not met with the same cordiality.[103]

One can also argue that the communal or social ways provide better governance,[104] but that argument goes to the well-being of insiders, and

101. F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 166-204 (1987) (calling it "informality and verticality" and demonstrating how adroitly the bureaucracy, through consultations and consensus, not only tames the recalcitrants but almost completely keeps the law and the judiciary out of the regulatory area).

102. *See* D. HENDERSON, 2 CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 207 (1965).

103. R.J. HUDDLESTON, GAIJIN KAISHA: RUNNING A FOREIGN BUSINESS IN JAPAN ch. 2 (1990) (on personnel).

104. The growth of alternative dispute resolution (ADR) in the United States during the past decade is striking evidence of popular recognition of the limitation of law, lawsuits, and lawyers, though actually the lawyers are promoting ADR in order to retain their turf in the dispute settlement field. Of course ADR is sociology, not jurisprudence. When I did my study of Japanese Conciliation, there was nothing in the legal indices on the subject. Though ADR was born only in the 1970s, and now there is even an ABA Committee on it, courses on ADR

not to the accommodation of an international trading system. It may be that the dry logical legalism of American culture is excessive, but entry by outsiders into the American business environment is easier. In America, with the advent of the "me generation," communal instincts have recently been diluted. The communal sense of balance between public and private concerns have been historically rooted in the American family, the church, and small towns, all of which have weakened by degree in recent times. One could argue that the American self-indulgent and individualistic bias, if that is what it is, began at least as far back as 1800, based on the self-reliance and rugged individualism required to tame the western frontier as it moved from the Atlantic to the Pacific, and was recycled back to the modern disorder and *anomie* of New York. Tokyo does not have that disorder, and it does and should make Americans wonder about the balance and priority of rights and order. The growing American interest in alternative dispute resolution is clear evidence of a recent reassessment of the social utility of our legal processes.[105]

B. Business and Culture

Almost as fundamental is the difference in the attitudes of Americans and Japanese toward work and business, especially big business. For over a century, it seems that many Americans have had a profound distrust of big business, city slickers, and Wall Street.[106] However justified this suspicion of American business may be, it is also unfortunate. The importance of faith in the private sector for the preservation of the basic institutions of property and the market is obvious. Surely a balance between the private and public sector gains importance from the events of the day, which disclose the tragedies of authoritarian socialism and of excess faith in the state and the public sector.

Yet, to this day there is much distrust in America of Wall Street, banking, and big business, not only because of their effect on the market, but also for their influence on government. Another, more recent, manifestation of American antibusiness sentiment is the growth of strict product liability law and punitive damages against business defendants. The

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in most law schools, and even a BNA Alternative Dispute Resolution Reporter, to mention only a few signs of how it is flourishing on the shortcomings of litigation. *See* Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982).

105. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, in THE ROLE OF THE JURY IN CIVIL DISPUTE RESOLUTION (1990).

106. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAWS 11 (2d ed. 1985).

scandals surrounding Wall Street insiders Ivan Boesky and Michael Milken[107] (as well as the savings and loan excesses symbolized by the Keating five) are examples of the reasons for this tradition of distrust. It is a major element of our culture, and stands in striking contrast to popular views of business in Japan.

Grouped into *keiretsu* and interfacing directly with government, the large Japanese manufacturing and exporting companies especially enjoy the reputation of heroes vanquishing the foreign competition for the good of the populace and the glory of the country. Ironically, the accomplishments of these giants of the corporate world reap the admiration earlier bestowed upon the haughty samurai of days past, and similar military rhetoric is used daily in the Japanese media to describe international exploits and conquests abroad.

American views are mixed. Deplorable as it may be, there is growing sentiment in the United States that, while American soldiers fight for the security of Japanese fuel lines, the Japanese fight for financial dominance with their savings. There is also a growing realization that economics and defense are linked, and a growing opinion that Japan is not accepting responsibility for the international balance of power commensurate with its economic rewards from the balance of trade.[108]

Japanese companies command an admiration and loyalty, akin to military discipline, evidenced in concrete terms by the lifetime commitments of their employees, as well as the six day work weeks and twelve hour day. The obedient work force is too tired for leisure and too busy to consume, so it saves, exports, and invests its earnings abroad. Recently, dedication to the company has given rise to a new phenomenon called *karoshi* (death from overwork),[109] which has surfaced as a national problem in the form of widows' compensation claims for husbands who are seldom seen, but who expire from overwork imposed by a social web of duties derived from the husband's ultimate concern, the company.

C. The Government Business Relationship

Big business and government meld at the top of the social pyramid in Japan. The Japanese government is much more supportive of business

107. *Symbol of the 90's*, Wall St. J., Nov. 23, 1990, at A8, col. 1.

108. Johnson, *The Problem of Japan in an Era of Structural Change*, IHJ BULL., Autumn 1989, at 3; *see also* Henderson, *Japan: Economic Aspects of National Security and Its Impact on United States Security*, 1 PUB. L.F. 99 (1981).

109. *See* T. Ueyanagi, Death From Overwork: Working Hours Laws and Workers' Compensation Law in Japan and the United States 57 (mimeo ed. 1990) (available at the University of Washington).

in foreign and domestic policy than is the United States government, despite some shifts by the United States toward deregulation and probusiness policies during the 1980s.

Reverse support is also evident in Japan: big business (and farmers) support the political campaigns of the ruling party quite directly. The system has been called a one-and-a-half party system, because of the continuous rule of the Liberal Democratic Party since the early 1950s. The subsidized rural vote makes this possible because the current electoral districting weights some rural votes at a four-to-one ratio compared to some urban districts. Yet, districts remain unchanged by the Diet, even though the Supreme Court has declared the current districting a violation of the Constitution.[110] Also, direct campaign financing by corporate gifts was approved as constitutional by the Supreme Court of Japan in the case of *Arita V. Kojima*,[111] which upheld a contribution of the then Yawata Steel Co. to the Liberal Democratic Party. Further, top bureaucrats look to private business for management positions at the end of their government tenure. This symbiosis of government and big business in Japan affects all aspects of business and finance, including the securities exchanges, and is apparently approved or condoned by the populace, though recently strained by the Recruit scandals. To repeat, in Japan, the business of government is business, and it pays well for all. The price is the strain on the international financial, security, and trading systems.

VI. CONCLUSION

To summarize, there are major differences in the Japanese and American legal systems: federal versus unitary; civil law versus common law; and guidance versus justiciable law. There are important differences in the specific features of the corporate law of the two countries. Also, there are very basic cultural differences in the way Americans and Japanese view business, even collusive business, and how they view the government/business relationship. The American popular attitudes toward things as basic as government, authority, and even law are vastly different than those in Japan.

By assuming these basic traits to be tolerably similar, Americans have consistently been hoisted on their own legalistic petards in the postwar period when trying to deal with Japan by relying on ethnocentric

110. Kurokawa v. Chiba Prefecture Election Commission, 30 Minshū 323 (Apr. 14, 1976); 39 Minshū 1100 (July 17, 1985). These cases and others on malapportionment are discussed in J. HALEY & D. HENDERSON, 2 LAW AND LEGAL PROCESS IN JAPAN 27 (1988).

111. 24 Minshū 625 (June 24, 1970).

penchants for promises, contracts, and laws promoting a free world economy. These concepts are not understood in the western sense on the other side of the Pacific. International legal regimes, bereft of enforcement mechanisms and addressed to uniformity in securities markets, are also not likely to accomplish much by law. Agreements or statutes made without an understanding of the contextual contrasts affecting enforcement will be yet another trans-Pacific illusion.